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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

IN THE MATTER OF LENDALL B. TERRY, JUDGE OF THE RIPLEY CIRCUIT COURT, 80th JUDICIAL CIRCUIT.	75-100 NO. A-958

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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JURISDICTION

This court held in Williams v. Kaiser (1944) 323 U.S. 471, 65 S. Ct. 363, 89 L. Ed. 398, as follows:

> "It is a well established principle of this court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U.S. 14, 18; Lynch v. New York, 293 U.S. 52."

During the course of the proceedings held on this matter before the Indiana Supreme Court, the Petitioner never challenged the Indiana Code of Judicial Conduct and Ethics as being so vague as to be void. The question of vagueness was, therefore, never an issue presented to the Indiana Supreme Court for determination.

The Petitioner, in some of the various pleadings he filed with the Indiana Supreme Court, did claim that he was being denied Due Process under the Fourteenth Amendment to the United States Constitution. The Respondent acknowledges that the vagueness issue is an element of Due Process under the Fourteenth Amendment, yet this Respondent does not believe a general assertion of a Fourteenth Amendment violation preserves as a federal question, any conceivable issue that the Fourteenth Amendment might cover.

Accordingly, it is submitted that since the question presented here was not presented to the Indiana Supreme Court, this Court has no jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's statement of the

Constitutional Provisions is correct.

RESPONDENT'S CORRECTIONS AND ADDITIONS TO PETITIONER'S STATEMENT OF RULE PROVISIONS AND STATUTE INVOLVED

The Indiana Statute, (Burns §49-819 or Ind. Code §5-8-1-19), Petitioner sets out as being involved in this matter was not involved in any way. It is an 1897 Act that was adopted seventy-three years prior to the very substantial 1970 revisions in the Indiana Constitution as it pertains to the judicial branch. Prior to 1970, the Indiana Constitution set the Indiana Supreme Court's jurisdiction as follows:

> Jurisdiction. - The Supreme Court shall have jurisdiction, coextensive with the limits of the State, in appeals and writs of error under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the General Assembly may confer.

Thus, the 1897 Act was necessary to bestow jurisdiction on the Indiana Supreme Court to discipline and remove judges. With the adoption of the 1970 amendments to the Indiana Constitution, this 1897 Act was superceded. It played absolutely no role in this matter.

The Indiana Constitutional provisions involved in this matter are:

> Article 7, §4. Jurisdiction of Supreme Court. - The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges. . . . (Emphasis added)
>
> Article 7,§7. Judicial circuits. - The State shall, from time to time, be divided into judicial circuits; and the Judge for each circuit shall be elected by the voters thereof. He shall reside within the circuit and shall have been duly admitted to practice law by the Supreme Court of Indiana; he shall hold his office for the term of six years, if he so long behaves well. (Emphasis added)

QUESTIONS PRESENTED

The Petitioner in his Petition for Writ of Certiorari, sets forth three questions, all of which appear identical. Respondent feels that there is only one question presented for review, which is as follows:

Is the Code of Judicial Conduct and Ethics so vague that its use by the Supreme Court of Indiana as a guide in the exercise of its inherent constitutional power to discipline and remove judges constitutes a denial of Due Process under the Fourteenth Amendment?

In order that there can be no question about the Petitioner being afforded Procedural Due Process, Respondent will also demonstrate that all constitutional protections were afforded Petitioner.

RESPONDENT'S CORRECTIONS AND ADDITIONS TO PETITIONER'S STATEMENT OF THE CASE

Petitioner's statement of the case requires the following additions and corrections:

1. In four days of evidentiary hearing before the hearing officer, the petitioner called witnesses on his behalf, confronted witnesses adverse to him, and was represented throughout by counsel.

2. The findings of facts and conclusions of the hearing officer were based on the pleadings filed; the evidence introduced at the hearing; and the proposed findings and briefs submitted by both the petitioner and respondent subsequent to the hearing.

3. The Supreme Court of Indiana did hold oral argument on the Petitioner's petition for review of the

hearing officer's findings and conclusions, and reviewed the complete transcript of the evidence.

ARGUMENT

I.

THE CODE OF JUDICIAL CONDUCT AND ETHICS IS NOT UNCONSTITUTIONAL

Petitioner's challenge to the Code of Judicial Conduct and Ethics is based upon his argument that the Code is "void for vagueness". Under the law as enunciated by this Court, the Code of Judicial Conduct and Ethics is not unconstitutional.

This case involves the suspension of a Circuit Court Judge in Indiana by the Supreme Court, pursuant to the Court's constitutional powers. The power to remove and discipline a judge is found in Article 7, §4 and Article 7 §7, of the Indiana Constitution. These provisions

are as follows:

> Article 7,§4. Jurisdiction of Supreme Court. - The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges . . . . (Emphasis added)
>
> Article 7,§7. Judicial Circuits - The State shall, from time to time, be divided into judicial circuits; and the Judge for each circuit shall be elected by the voters thereof. He shall reside within the circuit and shall have been duly admitted to practice law by the Supreme Court of Indiana; he shall hold his office for the term of six years, if he so long behaves well. (Emphasis added)

The standard of conduct used to determine whether or not a judge "behaves well" is found in the Code of Judicial Conduct and Ethics. The particular Rules of this Code which are involved here are Rules 1, 2, 3, 8 and 10. These Rules are as follows:

Rule 1:

"A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and in his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, he should strive to be beyond reproach."

Rule 2:

"A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

It is desirable, where the judicial system permits, that he should cooperate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice."

Rule 3:

"A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of

justice in the court."

Rule 8:

"A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions or to prevent improper argument or conduct of counsel. He should not be tempted to the unnecessary display of learning or a premature judgment."

Rule 10:

"A judge should adopt the usual and expected method of doing justice and not seek to be extreme or peculiar in his judgments or spectacular or sensational in the conduct of the court. In imposing sentence, he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency. Justice should not be moulded by the individual idiosyncrasies of those who administer it."

In addition to the rules of Judicial Conduct and Ethics, The American Bar Association, as well as the local bar associations, have standing Ethics Committees which regularly publish opinions on the standards expected of lawyers and judges. Thus, the rules of Judicial Conduct and Ethics and the written opinions of the various Ethics Committees have established clear ascertainable standards whereby a member of a highly selective profession, has knowledge of what conduct is prohibited. Such Standards are constitutional. In Parker v. Levy (1974) __ U.S. __, 94 S.Ct. ____, 41 L.Ed. 2d 439. a challenge was made against the manual for court-martial as vague when the defendant was charged with violation of the provision that required him to conduct himself as an officer and a gentleman. In reviewing the "void for vagueness" rule, the Court held:

"We disagree with the Court of Appeals both in its approach to this question and in its resolution of it. This Court has on more than one occasion invalidated statutes under the Due Process Clause of the Fifth or Fourteenth Amendments because they contained no standard whatever by which criminality could be ascertained. and the doctrine of these cases has subsequently acquired the shorthand description of 'void for vagueness.' Lanzetta v. New Jersey, 306 US 451, 83 L Ed 888, 59 S Ct 618 (1939); Winters v. New York, 333 US 507, 92 L Ed 840, 68 S Ct 665 (1948). In these cases, the criminal provision is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' Coates v City of Cincinnati, 402 US 611, 614, 29 L Ed 2d 214, 91 S Ct 1686 (1971)."

Thus, a statute is not void because the standards are imprecise, but only if there are no standards set. When we review the rules involved here, we find definite standards established. For example:

Rule Number 1 provides:

> "A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and in his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, he should strive to be beyond reproach."

Thus, a judge is required to act in his official capacity so that his conduct is free from impropriety and the appearance of impropriety. Certainly a judge should know when he is violating this provision. The Indiana Supreme Court in hearing the evidence, found that this Petitioner violated this standard of conduct. The evidence proves that the Petitioner had a personal vendetta with a local welfare board. Based upon this evidence, the Court found that the judge removed a board member in an unlawful manner; he solicited the votes of a welfare board member to accomplish his

purpose; he failed to appear at a lawful hearing for the removal of a board member. The evidence further proved and the Court found that the judge made false entries of record; that he attempted to file false criminal charges against a welfare board member's attorney; that he publicly harrassed the prosecuting attorney when he refused to file criminal charges when no probable cause existed. The Court further found that the judge conducted a campaign to lead the public to believe that he had information that a crime had been committed and then refused to appear before the grand jury to give his testimony. The Court further found that the judge publicly charged an attorney with failure to represent his client because the judge disagreed with the desired settlement. The Court found that the judge threatened to hold an

attorney in contempt of court because the attorney filed a motion for continuance and a motion for change of judge. The Court further found that the judge participated in a public campaign to circumvent disciplinary action.

Petitioner does not challenge these findings or the evidence upon which they are based. His challenge is that the rule is vague; therefore, he could not know that this conduct was improper. Such an argument is meaningless, particularly in light of this Court's expression in Parker v. Levy, supra, where the Court held:

> "We have noted in Smith v. Goguen, supra, slip opinion, p 7, 39 L Ed 2d 605, that more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression. For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater

flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter. But each of these differentiations relate to how strict a test of vagueness shall be applied in judging a particular criminal statute. None of them suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."

Certainly, a judge should know that he is not acting with propriety when he uses his judicial office for harrassment purposes, when he uses his judicial office and power to stir up a community accusing people of commission of crimes and then refuses to present his so-called evidence, when he makes false entries in the court's records and when he illegally attempts to remove board members from governmental agencies.

The judge's conduct as found by the Supreme Court does not stop here. The Court found that the judge would delay cases when the people were represented by counsel who were in his disfavor. In one instance the judge would not hear a contempt case arising out of a divorce matter because the client was represented by an attorney who was in disfavor and, as a result of this inaction, the client was stabbed by her husband. The Court further found under the evidence that the judge acted in an offensive manner and would demean the attorneys in the presence of their clients. That he would interrupt civil litigation and question the attorneys as to their motives on complaining about his conduct and would question witnesses beyond the limits of judicial propriety. All of these findings were supported by evidence which is not challenged. Such conduct is

obviously improper and this judge certainly should know that it was improper.

As this Court said in Parker, supra, the fact that one might pose a hypothetical situation that might be within the literal meaning of the rule does not render the rule void when the conduct complained of is clearly understood.

Other Federal courts have also construed statutes in conformity with this Court's opinion in Parker. In Sarisohn v. App. Div. (1967 E.D.N.Y.) 265 F. Supp. 455, the Court held:

> "The crux of plaintiff's complaint is that the statute fails to give him adequate warning and that its sweep is too broad because it leaves uncertain the standards which are required to be met as to the conduct it permits and the conduct it prohibits. While on its

face this may have some superficial plausibility, actually the phrase employed is only a practical means of providing flexibility. The words 'for cause' mean for a cause to be enumerated and specified in each particular instance so that the defendant may be duly notified and adequately prepared to defend the charges. It does not mean that a judge may be removed for 'cause' without more and without an enumeration of the charges constituting the alleged 'cause'. It would be impossible to enumerate in any statute all the possible grounds and circumstances justifying the removal of a judicial officer. Guidelines may be found in the Canons of Ethics, applicable to both attorneys and judges, adopted by the American Bar Association and other bar associations, and also in the general moral and ethical standards expected of judicial officers by the community. 'For cause' has been defined in several cases involving the removal of judicial officers and they provide a reasonable person with a competent definition of this phrase. See, Matter of Louis L. Friedman, 1963, 12 N.Y.2d (a), appeal dismissed, Friedman v. Court on the Judiciary of the State of New York, 1963, 375 U.S. 10, 84 S.Ct. 70, 11 L.Ed.2d 40; Matter of Osterman, 1963, 13 N.Y.2d (a), cert. denied, 1964, Osterman v. Court on the Judiciary of the State of New York, 376 U.S.

914, 84 S.Ct. 660, 11 L.Ed. 611; Matter of Kane v. Rudich, 1939, 256 App.Div. 586, 10 N.Y.S.2d 929; Matter of Newman v. Strobel, 1932, 236 App.Div. 371, 259 N.Y.S. 402. 'Cause' and similarly broad standards have been upheld against the charge of vagueness as used in numerous statutes, to justify removal from office or denial of license privileges."

Likewise, the court in In Re Bithoney (1973 1st Cir.) 486 F.2d 319, held:

"The question presented is whether the terms used in F.R.A.P. 46, i.e., 'demean [himself] . . . uprightly and according to law', and 'conduct unbecoming a member of the bar', are 'in terms so vague that men of common intelligence must necessarily guess at its meaning', Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), and thus deny due process when used as the basis for a disciplinary proceeding.

In the abstract, respondent may have a colorable claim that the terminology of F.R.A.P. 46 is so indefinite as not to afford sufficient warning of the behavior which is proscribed. But we are convinced that when placed in context, as part of a rule directed

to a discrete professional group, the terms take on definiteness and clarity. The legal profession has developed over a considerable period of time a complex code of behavior and it is to that code that such words as 'conduct unbecoming a member of the bar' refer. In addition, the American Bar Association has promulgated a Code of Professional Responsibility which embodies in considerable detail the standards of behavior currently expected of members of the bar. Disciplinary Rule 7-102(A)(2) of the Code provides that:

'(A) In his representation of a client, a lawyer shall not:

* * * * *

2. Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense, if it can be supported by good faith argument for an extension, modification, or reversal of existing law.'

Under these circumstances a member of the bar, like respondent, cannot complain that there is not at least a core area of clearly prohibited conduct which the words 'uprightly and according to law' and 'conduct unbecoming a member of the bar' mean to him."

Thus, in the instant case the Petitioner was suspended for conduct

which was not in conformity with the Disciplinary Rules for judges. The conduct itself was already repugnant to judicial propriety. Any reasonable judge would know that such conduct was improper.

The magnitude of this case cannot be minimized. This judge was the only judge in his circuit. The power possessed by a single judge in a circuit is awesome. True, his actions are subject to review, but as this Court is aware, such review is time consuming and the right of the parties are adversely affected when this all-powerful individual is trampling upon the people for personal gain or vendetta. There must be a standard of conduct and of necessity it cannot be precise. The Constitution of Indiana gives to the Supreme Court the power to supervise discipline and remove judges. The Code

of Judicial Conduct and Ethics sets the standard of conduct expected. Whenever the conduct of a judge is clearly in violation of these standards he must be stopped. This is the situation here. Any reasonable judge should know that he cannot do those acts proven against this Petitioner. Under these circumstances, the Supreme Court of Indiana acted in accordance with principles of due process and the rules complained of are not invalid.

II.

THERE WAS NO DENIAL OF PROCEDURAL DUE PROCESS

Although the Petitioner did not argue a violation of Procedural Due Process, the Respondent feels that this Court should be apprised that all constitutional mandates were followed.

The Constitution of the State of

Indiana gives the Indiana Supreme Court original jurisdiction to discipline, remove, and retire judges. In Re Evrard, (1974), __ Ind. __, 317 N.E.2d 841. In compliance with the constitutional mandate, the Indiana Supreme Court has established the Code of Judicial Conduct and Ethics to serve as guidelines for judicial conduct. The Supreme Court of Indiana also established the Admission and Discipline Rules to serve as procedures to be followed in effecting and imposing removals of judges from office. These procedures were fully complied with in evaluating the conduct of the Petitioner. The Petitioner was notified of the charges against him; given a copy of said charges; and afforded the opportunity to respond to the charges. George B. Hoffman, Chief Judge of the Indiana Court of Appeals,

was appointed to serve as hearing officer. Judge Hoffman conducted a four and one-half day public hearing. At the hearing the Petitioner confronted witnesses against him; introduced evidence on his behalf; and was represented by counsel. The hearing officer made written findings of facts based on the evidence. Upon petitioning by Judge Terry, the Indiana Supreme Court did review the hearing officer's findings; the one thousand pages of the transcript of evidence; and heard oral argument on the matter. The Indiana Supreme Court then handed down its decision supported by a detailed opinion. The Petitioner sought a rehearing, and it was denied.

In view of the recent decision of this Court in Withrow v. Larkin (1975), 420 U.S. _____, 95 S. Ct. 1456, 43 L. Ed.

2d 712, the Respondent believes that the above-mentioned process satisfies or exceeds the requirements of Due Process under the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above, Respondent respectfully prays that the petition for writ of certiorari be denied.

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